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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 346

In the Matter of the Application of

ANONYMOUS,

Petitioner,

For an Order awarding him custody of his infant daughter,

against

ANONYMOUS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals of New York, dated May 9th, 1957. The remittitur of the Court of Appeals was filed in New York County Supreme Court and judgment thereon entered on June 13th, 1957.

Petitioner appealed to the Court of Appeals of New York as of right on constitutional questions from an order of affirmance of the Appellate Division, First Department, entered in the office of the Clerk of said Appellate Division on or about June 19, 1956, affirming the order of the

Supreme Court, New York County entered on March 12, 1956 denying petitioner's application for custody and dismissing his petition; and from an order of the Appellate Division, First Department, entered in the office of the Clerk of said Appellate Division, First Department on or about June 19, 1956, affirming an order of the Supreme Court, New York County entered on March 12, 1956, denying petitioner's motion to strike from the records of this proceeding a certain affidavit and for other relief.

The Court of Appeals on May 9, 1957 dismissed the appeal from the order of affirmance denying custody, on the ground that no substantial constitutional questions were directly involved (Civil Practice Act. Sec. 588 Sub 1(a)); and the appeal from the order of affirmance denying the motion to strike a certain affidavit from the record on the ground that the order does not finally determine the proceeding within the meaning of the constitution.

Thereafter petitioner moved in the Court of Appeals for leave to appeal and this was denied without opinion on July 5, 1957.

Citations to Opinions Below

The Court of Appeals in rendering its decision gave no opinion. This decision has not yet been reported.

The Appellate Division, First Department affirmed unanimously without opinion. This decision is reported at App. Div. 2d 671, 153 N.Y.S. 2nd 559.

The Supreme Court at Special Term New York County, gave an interim opinion and then another opinion reversing the interim opinion. Both opinions are printed in full at pages 38-43 of the "Appendix" to this petition. The decision is reported at 150 N.Y.S. 2nd 454.

An order on the Court of Appeals decision of July 5, denying leave to appeal was never served on petitioner and

was never filed in the County Clerk's office with the rest of the record. It has not yet been officially reported. The decision received by petitioner is printed at page 33 of the "Appendix".

Jurisdiction

The order of the Court of Appeals dismissing the appeal was entered May 9th, 1957. The remittitur of the Court of appeals was filed in New York County Supreme Court and judgment thereon entered on June 13, 1957. The motion for leave to appeal to the Court of Appeals was denied on July 5, 1957.

The jurisdiction of this Court is invoked under 28 U.S.C.A., section 1257, subd. 3 (as amended by the Act of June 25, 1948, C 646 Stat. 929).

Questions Presented

The Constitutional Questions herein presented were raised in the father's original petition for custody and in the subsequent affidavits which he was directed to serve. Since there was no hearing the questions could be presented in no other way. The same constitutional questions were presented to the Appellate Division and the Court of Appeals in the record on appeal and in the briefs submitted on the appeals. The original decision dismissing the father's petition was decided only on the question of requirements of commity, and since no opinion was rendered by the Appellate Division in affirming, it must be assumed that the Appellate Division affirmed on the same ground. The Court of Appeals in dismissing the appeal held that constitutional questions were not directly involved. Such a decision merely avoids the constitutional issues raised and is not binding on this Court.

1. Does a State which has granted a decree of divorce and awarded custody of children, retain such control over the children as wards of the Court as to have authority to modify such decree with respect to custody, without service or notice upon either or both natural parents, and even when the child or children are no longer within the state?

2. Whether after a decree of divorce awarding custody to one parent as against the other and in the absence of a finding of unfitness of the parent to whom custody was not awarded, the parents could consent to remove the child from the jurisdiction of the state conferring custody, and voluntarily transfer custody from one to the other as the needs of the child required without first obtaining permission and consent for such transfer from the court originally making the custody decree?

3. Whether any court by its pronouncements and findings can make valid the void and unconstitutional acts of its own courts or the courts of a sister state?

4. Whether a custody order issued in violation of due process without notice or service upon the natural parent is effective beyond the boundaries of the state issuing it, to confer immunity upon a private person acting under such order in violation of the criminal statutes of another state?

5. Whether a state may give full faith and credit to the orders or acts of a sister state which bring about a violation of its own criminal statutes and precipitate the commission of a crime?

6. Whether the courts of a state may recognize the appearance as attorney for a party by a public officer in a private case, where such appearance is forbidden by law and is a misdemeanor under the statutes?

7. Whether a court may deprive its own citizen of the equal protection of the laws by refusing to entertain

jurisdiction of a case where jurisdiction is indicated and where failure to entertain such jurisdiction amounts to a condonation of a felony?

8. Whether a court may give full faith and credit to a decision of a sister state under an order vacated by the same court which originally made said order, and after said order was vacated as of the day it was granted?

9. Has a divorced father to whom custody of children has not been awarded, in the absence of any finding of unfitness, lost all his common law rights to his children and been freed of all obligation to them except the duty to support, so that if the mother subsequent to the decree becomes unfit, or unable to care for them, any relative or stranger may petition the courts and obtain custody of such children without notice to the father?

10. Whether the physical absence of the child from the state brought about by the commission of a crime, deprives the state of the right to make decrees relative to custody?

11. Whether the physical presence of a child in a state, brought about by the commission of a crime, confers jurisdiction upon that state to make decrees relative to custody?

12. Whether a child may be illegally removed and kidnapped from one jurisdiction and used as a pawn and a hostage to compel the father to submit to the jurisdiction chosen by the kidnapper?

13. Whether the trial court committed prejudicial error and deprived the father of his constitutional rights by failing and refusing to follow the statutory, usual and accepted modes of practice and procedure?

14. Where a child has been kidnapped from one state and transported to another for the sole purpose of avoid-

ing the jurisdiction of the one state and conferring it upon the other, may the Uniform Support of Dependents Law be used to compel the father to pay for the support of the child or children who have been illegally taken from him, to the very persons who have wrongfully abducted his child?

Statutes Involved

Annotated Laws of Mass., Chapter 208, Sections 28 and 30.

New York Penal Law, Section 1250, subdivision 2 and Section 1252.

Section 227-A of the New York Civil Practice Act.

Uniform Support of Dependants Law of New York and Mass.

Section 898 of New York City Charter.

Section 394-A-4.0 of the laws of 1942, No. 50 of the Administrative Code of the City of New York.

United States Constitution Amendments IV and XIV, Section I.

New York State Constitution Article 1, Section 11.

Facts

On the morning of April 1, 1955, the infant Dorothy Gail Aberlin who had been peacefully living with her father at 165 West 20th Street, went to her school in New York City as usual. On the afternoon of April 1, 1955, her uncle by marriage, one James Zisman, an attorney in the State of Massachusetts, came to New York, waited for her outside the school and without notice to, or service of any kind upon her father, the petitioner-appellant herein, seized the child and transported her to Massachusetts. This blatantly bold and lawless act has precipitated the

instant grievous litigation and was itself precipitated by an equally lawless act of the Probate Court of Suffolk County, Massachusetts, which without service upon or notice to the father, while the mother was an adjudicated incompetent in a mental hospital and while the child was living with her father in New York, saw fit to issue an order allegedly giving temporary custody of the infant to Mr. Zisman's wife. This order was so issued on an unsworn statement by Mrs. Zisman, devoid of any corroboration, that the child's mother to whom custody had been awarded under a Massachusetts decree was "temporarily ill" and "not being properly cared for by the father". (R. fols. 109 through 111). The order which was issued the same day on which application therefor was made, merely awarded custody and was silent as to payments for support. These facts are uncontroverted, but even if controverted must be taken in the light most favorable to the petitioner since his petition was dismissed without hearing.

Not content with stealing another man's child, Mr. Zisman then made demands upon the father for support money which the father upon advice of the New York District Attorney refused to pay. Then when the father went to Massachusetts to get his child, Mr. Zisman was successful in having him held for alleged contempt of court and jailed for refusing to pay money to the kidnappers of his child, although the alleged order giving the Zismans temporary custody gave them no right to any money.

The father conditioned by this experience refused to submit to the jurisdiction of the Massachusetts Probate Court and brought a Habeas Corpus proceeding in the Massachusetts Superior Court, demanding the return of his child on the ground that the Probate Court had violated his constitutional guarantees in that it had issued a custody order without service or notice upon him while the child was lawfully living and domiciled with him in New York. The father claimed his right to custody of the child both by the affirmative acts of the mother, who had turned the

child over to him, and by operation of law, since his common law rights to custody of his own child revived when the mother became mentally ill and was adjudicated incompetent.

When those in high places commit lawless acts, the need for face saving brings forth some precious legal sophistry. The Superior Court of Massachusetts, although it had jurisdiction to do so, would not interfere with the Probate Court and try the *Habeas Corpus* on the merits, but concerned itself only with the question of domicile as to whether or not the Massachusetts Probate Court had lost its jurisdiction over the child when the mother moved to New York with her. After hearing on these issues only, the Superior Court of Massachusetts came out with this priceless decision, to wit, that the Probate Court had jurisdiction to make the order awarding temporary custody to the Zismans, because when the mother moved to New York some 7 or 8 months prior to her adjudication, she was already too confused to be able to have had an intention to change her domicile. This, although no evidence had been given at the trial of her condition at the time she moved to New York and although lack of service upon and notice to the father was admitted.

The father appealed that decision. Then Zisman, still not being able to get any support money conceived the brilliant idea of using the new Uniform Support of Dependent's Law to force the father to pay. He then went back to the Probate Court, and on his wife's petition and his own motion, obtained an order vacating the order of temporary custody as of the day it was granted and allegedly restoring custody to the still incompetent mother. Then under the incompetent mother's name, proceedings were instituted in the Domestic Relations Court of New York to compel the father to pay. This move had a threefold purpose. It enabled the Zismans to sue in New York for support, it saved them the expense of hiring a New York attorney, for under the Uniform Support Law

the Corporation Counsel of New York represents the petitioner, so that they were able to litigate at public expense, and it stopped the father's appeal from the Superior Court's decision, for the attack on the validity of a now vacated order was academic.

However, Zisman had not been cognizant of one fly in his ointment. Under the new section 227-a of the New York Civil Practice Act, the father could and did obtain an order to show cause to be served on the Corporation Counsel to try the issue of custody on a petition to the chancellor in the Supreme Court of New York County and in the meantime to stay the Corporation Counsel from proceeding with the applications for support in the Domestic Relations Court. After this petition was served and filed, and the Domestic Relations Court proceeding stayed, the Corporation Counsel sought to dismiss the father's petition. The father raised the issue that whereas the Corporation Counsel could accept service for the mother under C.P.A. 227-a, there was nothing in any statute which permitted a public agent to litigate a private custody battle in the Supreme Court.

Neither the mother nor those hiding behind the mother's name appeared or answered. The presiding judge rendered an interim opinion which recited the facts, referred to this case as a "strange drama" and found that comity between the states did not require a court to shut its eyes to surrounding circumstances or to enforce orders which were the result of "defiance and utter disregard of the law." He ordered the Corporation Counsel to communicate with the mother and the Zismans and try to obtain their appearance at a hearing in the meantime continuing the stay of the Domestic Relations proceeding. (Appendix B—p. 38.)

Weeks went by, nothing was done. Then on January 6, 1956, Mr. Zisman came to New York, to the office of the Corporation Counsel, met the Assistant Corporation Coun-

sel, Rose Schneph and, without notice to or knowledge of the petitioner or his attorney went with Miss Schneph, on the City's time, to have a conference with the secretary to the presiding judge. These facts have been gleaned from statements in Zisman's own affidavit (R. fol. 186). As a result of this conference, although there was still no appearance or answer in the proceeding by the mother or anyone on her behalf, Zisman obtained leave to and subsequently on January 31 did serve voluminous affidavits and self serving exhibits. Among the exhibits were the findings of fact, rulings and order on the Habeas Corpus proceeding brought by the petitioner before the Massachusetts Superior Court. These findings corroborate the petitioner's allegations that no hearing on the merits of custody had been had in Massachusetts, and that the Superior Court had found as a fact that the child's mother had been committed and was still not discharged; that the Zismans had obtained an order for temporary custody without notice to or service upon the father; that the petition was allowed the same day it was filed and that the child was physically in New York when the custody order was made and that the mother had been living in New York since, September, 1954 and had been brought back to Boston after she became ill. The Superior Court then went on to hold that the mother's domicile had never been changed from Boston and that the Probate Court had jurisdiction when it entered its *ex parte* order giving the Zismans temporary custody (R. fols. 228 thru 231).

Although the affidavit and exhibits submitted by Zisman corroborated the petitioner's allegations, the acceptance of such an affidavit in a custody proceeding, where no appearance had been entered and no answer filed on behalf of the respondent, was completely without precedent or authorization under New York Practice. Petitioner moved to strike the affidavit from the record. Zisman was not a party, had not appeared in the action, and could not appear for he was not a New York attorney. The affidavits

and exhibits were replete with self-serving declarations and immaterial and wholly irrelevant matters. It was pointed out to the Court that the findings of fact and the order made by the Massachusetts Superior Court no longer had any efficacy because the very Probate Court order which the Superior Court found on July 15, 1955 that the Probate Court had a right to make, was vacated as of the day it was issued on September 23, 1955, by the same Probate Court. The motion to strike was referred back to the Judge who had made the interim decision and was denied. Over his objection, the petitioner replied to Zisman's affidavit and again raised the questions of constitutionality, lack of due process and the equal protection of the laws, but in spite of the fact that no issues had been raised by answer, and in spite of the fact that no new matters in defense had been brought forth, the presiding justice on March 5, 1956 completely reversed himself and dismissed the petition on the ground that the matter of custody had been fully litigated in Massachusetts Superior Court and that custody had been denied to the petitioner although there is nothing even in the papers submitted by Zisman to substantiate a finding of denial of custody upon an order merely dismissing a Habeas Corpus heard only on a question of domicile and not on the merits.

Thereafter petitioner appealed to the Appellate Division and raised the same constitutional questions but the decision was unanimously affirmed and the subsequent appeal as of right to the Court of Appeals, on these constitutional questions, dismissed as has been set forth above.

Reasons for Granting the Writ

The trial justice in reversing his interim opinion and dismissing the father's petition gave as his reason for so doing, the requirements of comity between the states, which compelled him to give full faith and credit to the decision of the Massachusetts Superior Court allegedly denying custody to the petitioners (R F 398, 399).

There is neither factual nor legal basis for such decision.

It is the final chapter in what the trial justice himself termed "a strange drama" a chronicle of a series of utterly lawless and unconstitutional acts and decisions.

Attached to the affidavit of Mr. Zisman which the trial court received over petitioner's objections is a copy of the detailed findings of fact and conclusions in that habeas corpus proceeding. These findings show that the only question considered was the jurisdiction of the Massachusetts Probate Court to make the order awarding Mrs. Zisman temporary custody of petitioner's child (R. fols. 228 thru 231).

It is well settled in all the annals of law that a court's jurisdiction requires two fundaments for valid decisions.

1. Jurisdiction of the subject matter.
2. Jurisdiction of the parties.

On page 76 of the record (fol. 228) Mr. Justice Goldberg found as follows:

> "On March 25, 1955, Selma's sister, Lenore Zisman, filed a petition in the Probate Court of Suffolk County asking for temporary custody of Dorothy Gail and the modification in that extent of the decree *nisi* of May 15, 1953, which awarded the custody of the child to Selma. No order of notice was issued to the petitioner and no apparance was filed for him. He, in fact, had no knowledge of the filing, or of the intent to file the petition. The petition was allowed the day it was filed. Dorothy Gail was physically in New York City when the petition was filed and when it was allowed. On April 1, 1955, James Zisman went to New York and came back with Dorothy Gail."

The record also shows that no notice was served on the incompetent mother who on that day and on the day on

which the child was taken was actually incarcerated in Boston State Hospital.

The Massachusetts Superior Court Justice then went on to rule (fol. 231):

> "I find that the Probate Court of Suffolk County had jurisdiction when it entered its decree on March 25, 1955, awarding temporary custody to Lenore Zisman."

Not only was this ruling in conflict with the Constitution of the United States, Amendment 14 and the decision of this Court thereunder that due process requires notice and an opportunity to be heard, but it is in conflict with the statutes of Massachusetts itself.

Chapter 208 of the Annotated Laws of Massachusetts, Sec. 28 (Appendix A), provides that decrees after divorce relative to custody must be made on notice to both parents.

Without notice and opportunity to be heard, the Probate Court had no jurisdiction of the parties. One of the essentials to jurisdiction being absent, the order of custody to Mrs. Zisman, under our constitution was utterly void.

No pronouncement of any court, either New York or Massachusetts could make that order valid.

The finding of the Massachusetts Superior Court and of the New York Trial Court that the order of the probate Court and the decision of the Massachusetts Superior Court is valid and binding are not only in conflict with the due process clause but even with Massachusetts decisions.

In *McDonald* v. *Mabee*, 243 U. S. 90, the Supreme Court held that a judgment void for want of due process is as ineffective in the State of its rendition as elsewhere.

In *Needham* v. *Thayer*, 147 Mass. 534, the Massachusetts Court held, that a judgment against a non-resident who was not served with process personally within the State was void and that the citizen of the other State was not obliged to resort to a writ of error to invalidate the judg-

ment, but could oppose it as void without going to the expense and trouble of a writ of error.

In *Eliot* v. *McCormack*, 144 Mass. 10, the Supreme Court of Massachusetts held that where a judgment was invalid at its inception under the due process clause because of lack of service, the mere fact that a Court had found against a citizen of another State who had resisted the judgment by pleading its invalidity in a defense to action on the judgment did not make the invalid judgment valid. He had the right to continue resisting the invalid judgment. Where a judgment is void, it is void for all purposes and *no* suit can be maintained on such a judgment in the same or any Court.

The reasoning must follow that if suit cannot be maintained on a void judgment neither can it be used to bar any subsequent action, nor can the pronouncement of another Court holding the void judgment valid, be a bar to subsequent action.

Even as to the other essential requirement for jurisdiction, to wit, jurisdiction over the subject matter, we find serious question.

The facts are uncontroverted that the mother and the child had both been living in New York. The facts showed that the mother had intended to change her domicile to New York. Mr. Justice Goldberg in the Massachusetts Superior Court decision however found that the mother was already too confused when she went to New York to have been able to have the intent to change her domicile. But even if the Court were correct in that finding, the child was admittedly actually living in New York with her father. Her mother was admittedly an adjudicated incompetent. The mother was no longer able to care for her. At that point, the father's common law rights to custody, certainly for the duration of the mother's illness, revived, and the child was legally and validly with her father. At

that point it was not only the father's right but his duty to care for and protect his child. At that point, even more cogent was the child's God-given right to have the love and protection and comfort of the parent who remained competent. To have so deprived her of her own father in a time of such crisis in her innocent young life is a horrendous thing, and should be tolerated by no court.

It is well settled law that children may be taken from their natural parents only for the gravest of reasons, and that the burden of proof of unfitness rests on him who would challenge the fitness of a natural parent. The law is the same for both New York and Massachusetts.

Barry v. *Sparks*, 306 Mass. 80;
Matter of Thorne, 240 N. Y. 444, 148 N. E. 630.

In New York the law has gone further and in the few isolated cases reported has held that after a divorce where custody has been given the mother, the father becomes entitled to custody when the mother becomes incompetent or unable to care for the children.

King et al. v. *King*, 277 N.Y.S. 653, 243 App. Div. 780;
People v. *Cuisinier*, 112 N.Y.S. 2nd 331, 279 App. Div. 1037.

Obviously then when the mother was an adjudicated incompetent the child being domiciled in New York with her father, and living in New York with her father, the Probate Court of Massachusetts did not even have the requirement of jurisdiction over the subject matter to make the decree for temporary custody.

Yet for the purpose of argument only, suppose that the father is wrong, that he did not get custody of his child by operation of law, that the mother's adjudication did not operate to revive his common law rights. Nevertheless

he had physical custody of the child not by any seizure or wrong-doing on his part. He had the child by the mother's own voluntary acts, by her own consent and doing and intention expressed in writing. Massachusetts claims this cannot be done, that having once made a divorce decree and a decree of custody, the child became her ward, and her mere physical absence from the state did not divest Massachusetts of jurisdiction of the child, and that as the child's guardian and protector she had the right to stretch out her protecting arms and seize that child no matter where; that the child could not be removed from the jurisdiction.

Is such a contention compatible with our way of life and our constitution? Does not such a contention invest a state, not with democratic but totalitarian powers, where the individual becomes a cog—a nothing—? Or is it to be considered that the mere fact of divorce makes such a culprit of the father that he must be forever punished, and his sins visited upon his children?

Such findings are utterly repugnant to our constitution, interfere with the free migration of citizens and abridge their privileges and immunities.

In *Williams* v. *Fears*, 179 U. S. 270, this Court held that the right of locomotion to move from one place to another according to inclination is an attribute of personal liberty and guaranteed by the 14th Amendment.

In *Meyer* v. *Nebraska*, 262 U. S. 390, this Court defined the liberty guaranteed by the due process clause as to include not merely freedom from bodily restraint but also the right of the individual to engage in any of the common occupations of life, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

It is the petitioner's contention that the due process clause also includes the right of divorced couples to agree as to custody of their children, to transfer custody from

one to the other as the needs of the child arise, without resort to the courts, and that the courts should interfere only when the divorced parents cannot agree or the welfare of the child is being jeopardized.

Even the statutes of Massachusetts give the parents the right to remove the child from the jurisdiction upon consent of both.

Annotated Laws of Massachusetts, Chapter 208, sub. 30.

It has been shown that the Probate Court order of temporary custody was void for lack of jurisdiction.

It has been shown that the finding of the Massachusetts Superior Court that the Probate Court had jurisdiction, could not make that void order valid.

Not only do the rules of comity not require the Court of another state to give full faith and credit to the void acts and judgments of a sister state but to do so, and to refuse jurisdiction on such a flimsy pretense, is to itself deny to the petitioner the equal protection of the laws and the right to use the courts for redress of wrongs, and is in and of itself unconstitutional.

But the error of the New York Supreme Court becomes even more apparent when in further examination it appears, that not only was the Superior Court finding void, and the Massachusetts Probate Court order, void, but actually at the time the father brought his petition in New York and at the time the New York Supreme Court dismissed the petition on the ground that it was barred by a prior Massachusetts decision, there was no decision whatsoever in being.

The record shows and it is admitted that after Judge Goldberg gave his decision in Superior Court on June 15, 1955, holding that the Probate Court had jurisdiction to make the temporary custody order, on September 23, 1955,

Mr. Zisman went back to the Probate Court and had the order giving his wife temporary custody vacated as of the day it was granted (R. fols. 118 thru 129).

There now being no temporary custody order, and by the order of the Court making it, there never having been such an order—the finding of the Superior Court that the Probate Court had a right to make an order not in being must also fail.

How can a vacuum be used as a bar under the rules of comity?

The Probate Court of Massachusetts had no jurisdiction to make an order of temporary custody or any order with respect to this child. Courts makes mistakes and ordinarily mistakes can be corrected. When Zisman received that void order had he followed accepted procedure and served it on the father and taken ordinary legal steps to make it effective, this case would not now be before the Courts and much grief and suffering and expense have been saved everybody.

But Mr. Zisman is a lawyer—he knew or should have known that the order was void. He certainly did know that the father would resist the enforcement of that order. But he also knew that he wanted litigation over the order in his own probate court and he wanted jurisdiction over the father. He knew that there were many decisions on record holding that a state where a child is found may make orders relative to custody and that prior decrees are not binding. So he took matters in his own hands and came to New York and unbeknownst to the father literally kidnapped the child violating not only the 4th Amendment to the Constitution but the criminal statutes of New York.

Under Section 1250, subdivision 2, of the New York Penal Law, even if the father did not have legal custody, he did have the rightful care and control of his child during the mother's incompetency, and the taking of the child from him under a void order was a kidnapping and a

felony. All the legal sophistry in the world cannot alter those facts.

After the Interim decision in New York by Mr. Justice Markewich, in which he called the taking of the child a virtual kidnapping, Mr. Zisman in his own affidavit (R. fol. 186) states that

> "On December 28, 1955, I received a letter from the Law Department of the City of New York advising of the pendency of proceedings in the New York Supreme Court and enclosing a copy of the memorandum decision by Mr. Justice Arthur Markewich. Thereafter I called Rosh Schneph, Esq., Asst. Corporation Counsel, and advised her that I would arrange to be in New York on Jan. 6, 1956, and requesting a conference with the Court, so that I might be of some assistance in the situation. I met with Miss Schneph on Jan. 6, 1956 at her office and thereafter we met with Martin Klein, Esq., Secretary to Mr. Justice Markewich, and I submitted all the information, data, and records * * *"

Thereafter, after this highly irregular and reprehensible meeting, without benefit of the presence of or notice to the petitioner, the presiding judge completely reversed himself without any basis in law or fact and found that everything was regular and in order and nothing wrong had been done and, much as he sympathized with the father, nothing could be done because he did not have jurisdiction because the child was no longer here.

Kidnapping of children across state lines for the purpose of changing jurisdiction has long been a thorny problem in the Courts. Although there are many decisions holding that Courts may make custody decrees where children are within its borders, there are few decisions on record as to the right and power of Courts to make decrees where the children have been removed. Massachusetts has

consistently held that it retains such right and in fact, this instant litigation has arisen because of the position she has maintained in this respect.

In *Conly* v. *Conly*, 324 Mass. 530, the Court held:

> "But it would be difficult to formulate any satisfactory reason why mere physical absence should preclude a decree for custody of a child whose domicile remains within the jurisdiction."

This case follows a long line of similar Massachusetts rulings.

New York has been a bit more lukewarm in its position, but in *May* v. *May*, 232 App. Div. 519, held that where both parties are before the Court, custody of a child or children without the jurisdiction may be made.

New York, however, has been greatly concerned about the illegal transporting of children across state lines and has refused to accept jurisdiction where children were illegally brought within her boundaries, by subterfuge and trickery.

> In *Matter of Hubbard*, 82 N. Y. 90;
> *Sutera* v. *Sutera*, 150 N.Y.S. 2nd 448, 1 A. D. 2nd 536.

In the case at bar both parties were validly before the Court. The service upon the mother through the corporation counsel pursuant to Section 227-A of the Civil Practice Act was never questioned and has been accepted as valid.

This section has been held to be constitutional on appeals to the United States Supreme Court.

> *Adam* v. *Saenger, et al.*, 303 U. S. 59;
> *Frank L. Young Co.* v. *McNeal Edwards Co.*, 283 U. S. 398.

The child was validly with her father in New York when she was illegally seized. The jurisdiction to litigate over custody rightfully belonged in New York. It is accepted law that courts may not entice citizens of other states across state lines to confer jurisdiction, and judgments obtained by service by trickery have been held invalid. This child was seized for the purpose of obtaining jurisdiction of the litigation in Massachusetts where obviously Mr. Zisman had the edge. In New York he would have had to retain other counsel. In Massachusetts he is the counsel. In Massachusetts in the Probate Court he could obtain counsel fees when the father sought to regain his child, and he could compel the father to agree to terms for the return of his child. Where is the essential difference between seizing a child to confer jurisdiction and using her as a pawn to exact terms, and the ordinary kidnapping for ransom?

This Court should grant certiorari not only because the decision is in conflict with the constitution and with other State and Federal decisions, but because the whole history of this litigation shows a need for calling into use its general supervisory powers. All rules of law and ordinary practice and procedure and adherence to due process were flouted in both jurisdictions. Not only did Massachusetts violate the 14th Amendment by making a custody order, without service or notice, but New York likewise violated it when she denied custody and dismissed the father's proceeding, after jurisdiction had been obtained, without hearing and without any attempt to follow ordinary practice and procedure. After service on the mother through the Corporation Counsel, there was no valid appearance or answer on her behalf. The Corporation Counsel could be served but had no authority to appear and litigate in a private custody case and in fact committed a misdemeanor in so doing.

N. Y. City Charter, Section 898 (Appendix A);

Administrative Code of the City of New York, Section 394.A.4.0, of the laws of 1942, No. 50 (Appendix A).

After default in answer without a motion to open the default or notice to the father, after a private conference with the presiding justice's secretary, at which the father was not present and of which he was goven no notice, the perpetrator of the outrage, Zisman himself, was permitted to file so-called answering affidavits, although he had no standing in the case. There is no authority in the law for such procedure. The father's motion to strike this affidavit from the record was denied. The Corporation Counsel continued to litigate unlawfully on behalf of the respondent. Then the trial justice completely reversed himself and although he had stated that a custody matter could not be decided on affidavits; although an alleged prior judgment of another state had never been raised by answer as a bar to the litigation; although the alleged prior judgment and its contents were never validly proven in court; although the trial justice's final opinion admitted that

> "It appeared prima facie at least that petitioner's divorced wife had intended to change her domicile or, in any event, that of their child from Massachusetts to New York, that she had intended to pass custody of the infant, granted to her by the Massachusetts courts, to petitioner and did deliver the child to the father; that thereafter the child was removed to Massachusetts by her maternal uncle; that, in effect a fraud had been practiced upon the courts of Massachusetts by concealment of these facts, and that a crime had been committed.
>
> Regardless of the form of the petition, sufficient had been shown to sustain the inference that there might well have been a miscarriage of justice for which a remedy whether in the nature of prohibition or otherwise, might be found."

nevertheless, went on to decide, without hearing, without proof, on affidavits only that "it is now quite clear * * * that no fraud was practiced * * *" and dismissed the petition.

A *prima facie* case raised issues which required answer and opportunity to present proof.

In *People ex rel. Terman* v. *Terman*, 267 App. Div. 173; 45 N.Y.S. 2nd 226, the New York Courts held that on a motion to dismiss a petition for *Habeas Corpus* to secure custody of a child, allegations of the petition must be deemed to be true and the trial Court could not dismiss the petition without a hearing and the taking of testimony.

The trial justice's decision in the instant case is directly in conflict with other decisions in custody matters relative to the requirement of a hearing.

Such departure from ordinary procedure is a violation of due process. Due process requires that a case shall be decided in accord with the usual practice and procedure followed in such cases in the tribunal where heard.

Brinkerhoff-Faris Trust & Savings Company v. *Hill, Treasurer etc.*, 281 U. S. 673;
Windsor v. *McVeigh*, 93 U. S. 274.

This case is important. It is important not because one individual child and her father have been wronged. It is important because if the decision is permitted to stand, a dangerous precedent will have been established. A divorced father will be helpless to protect his own child against seizure by unscrupulous persons under *ex parte* orders, by persons who seize the child not for love and under emotional stress, as when a child is taken by her own parent, but out of cold calculation of the ~~natural~~ material benefits to be derived by using the child as a pawn—Courts should zealously protect a child against such misuse, even when to protect them, may mean embarrassment for the

Court granting the *ex parte* orders or making the decisions, and even when the protection may raise the spectre of possible criminal prosecution for the perpetrator of the wrong.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

DORA ABERLIN,
Attorney for Petitioner.

August 5, 1957.

Appendix A

STATUTES INVOLVED

Chapter 208 of the Annotated Laws of Massachusetts, Section 28—

"Upon decree of divorce, or petition of either parent, or of a next friend in behalf of the children, after notice to both parents, after decree, the court may make such decree as it considers expedient relative to the care, custody and maintenance of the minor children of the parties * * *"

Chapter 208 of the Annotated Laws of Massachusetts, Section 30—

"A minor child of divorced parents who is a native of or has resided 5 years within this Commonwealth and over whose custody and maintenance the Superior Court, or a Probate Court has jurisdiction shall not, if of suitable age to signify his consent, be removed out of this Commonwealth without such consent, or if under that age without the consent of both parents, unless the Court upon cause shown, otherwise orders."

New York Penal Law, Section 1250, subdivision 2—

"A person who wilfully: 2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parents, guardian, or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child;

* * *

Is guilty of kidnapping, which is a felony * * *"

New York Penal Law, Section 1252—

> "Upon a trial for a violation of this article, the consent thereto of the person kidnapped or confined shall not be a defense, unless it appears satisfactorily to the jury that such person was above the age of sixteen years, and that the consent was not extorted by threats or duress. As amended L. 1928, c. 355, eff. Sept. 1, 1928."

Section 227-a of the New York Civil Practice Act—

> "**Designation by a non-resident plaintiff of Attorney as agent to receive service of process in separate action or proceeding.** The commencement of any action or proceeding in any court of this state by any person not residing in this state shall be deemed a designation by such non-resident person of the attorney appearing in such action or proceeding for such non-resident person as his agent to receive, during the pendency of such action or proceeding, service of process in any court of this state for the determination of any cause of action or claim asserted, either separately or along with any other person or persons, by any person named as a defendant or a respondent in the action or proceeding so brought, against such non-resident person either separately or along with any other person or persons, * * *"

Section 898 of New York City Charter—

> "No officer or employee of the City or of any of the counties within its limits shall detail or cause any officer or employee of the city or of any such counties to do or perform any service or work outside of his public office, work or employment; and any violation of this section shall constitute a misdemeanor."

Section 394-A-4.0 of the laws of 1942 No. 50 of the Administrative Code of the City of New York—

> "It shall be unlawful for the corporation counsel or any of his assistants to appear as attorney or counsel in any action or litigation except in the discharge of his official duties, or to accept an appointment as referee or receiver in any action or proceeding."

United States Constitution, Amendment IV—

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1—

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitution, Article 1, Section 11—

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. * * *"

The Uniform Support of Dependents Law has not been printed because voluminous, not directly involved, and only of very general use and interest herein.

Appendix B

ORDER OF COURT OF APPEALS

COURT OF APPEALS

STATE OF NEW YORK, ss.:

Pleas in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 9th day of May in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

Witness,

The Hon. ALBERT CONWAY
Chief Judge, Presiding

RAYMOND J. CANNON,
Clerk.

Remittitur—May 9, 1957
No. 328

In the Matter of the Application of

ANONYMOUS,

Petitioner-Appellant,

For an Order awarding him custody of his infant daughter,

against

ANONYMOUS,

Respondent-Respondent.

Be it remembered, that on the 14th day of November in the year of our Lord, one thousand nine hundred and fifty-six

Anonymous the petitioner-appellant in this cause, came here unto the Court of Appeals, by Dora Aberlin his attorney, and filed in the said Court, Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And Anonymous, the respondent in said cause, afterwards appeared in said Court of Appeals by Peter Campbell Brown her attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Miss Dora Aberlin, of counsel for the appellant, and by Mr. Alfred Weinstein, of counsel for the respondent, and after due deliberation had therein, did order and adjudge that the

Appeal herein from the order of affirmance denying custody be and the same hereby is dismissed upon the ground that no substantial constitutional question is directly involved (Civ. Prac. Act Sect. 588—Sub 1(a)).

Appeal from the order of affirmance denying the motion to strike a certain affidavit from the record be and the same hereby is dismissed upon the ground that the order does not finally determine the proceeding within the meaning of the constitution.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said appeal from the order of affirmance denying custody be dismissed etc. Appeal from the order of affirmance denying the motion to strike a certain affidavit from the record dismissed etc., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals

aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office
Albany, May 9, 1957

SEAL

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk

Appendix B

JUDGMENT

At a Special Term, Part II of the Supreme Court, held in and for the County of New York, at the County Courthouse in said County, on the 13th day of June, 1957.

Present: Hon. VINCENT A. LUPIANO, Justice.

In the Matter of the Application of

ANONYMOUS,

Petitioner-Appellant,

for an Order awarding him custody of his infant daughter,

against

ANONYMOUS,

Respondent-Respondent.

The petitioner-appellant having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department entered herein in the office of the Clerk of said Appellate Division on or about the 19th day of June, 1956, affirming the order of the Supreme Court, New York County, entered on the 12th day of March, 1956, denying petitioner's application for custody and dismissing the petition; and from an order of the Appellate Division of the Supreme Court, First Department, entered herein in the office of the Clerk of said Appellate Division, on or about the 19th day of June, 1956, affirming an order of the Supreme Court, New York County, entered on the 12th day of March, 1956, denying petitioner's motion to strike from the records of this proceeding a certain affidavit, and for other relief, and the

appeal having been duly argued in the Court of Appeals, and that Court, in an order dated the 9th day of May, 1957, having ordered and adjudged that the appeal herein from the order of affirmance denying custody be dismissed upon the ground that no substantial constitutional question is directly involved (Civil Practice Act Sec. 588, subd. 1 (a)), and that the appeal from the order of affirmance denying the motion to strike a certain affidavit from the record be dismissed upon the ground that the order does not finally determine the proceeding within the meaning of the constitution, and having further ordered that the records and proceedings in that Court be remitted to the Supreme Court, there to be proceeded upon according to law,

Now upon reading and filing the remittitur from the Court of Appeals, it is

ORDERED that the order and judgment of the Court of Appeals be and the same hereby is made the order of this Court.

Enter,

V. A. L.,
J. S. C.

Filed
June 13, 1957
New York Co. Clerk's office

Appendix B

DECISION COURT OF APPEALS—JULY 5, 1957
DENYING LEAVE TO APPEAL

Mo. No. 258

In the Matter of the Application of

ANONYMOUS,

Petitioner-Appellant,

for an Order awarding him custody of his infant daughter,

against

ANONYMOUS,

Respondent-Respondent.

Motion for leave to appeal denied.

Appendix B

Order of Affirmance Denying Custody and Dismissing Petition.

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 19th day of June, 1956.

Present—Hon. Bernard Botein,
Justice Presiding,
" Benjamin J. Rabin,
" Joseph A. Cox,
" Francis Bergan,
Justices.

10213

In the Matter of the Application

of

Anonymous,

Petitioner-Appellant,

For an Order awarding him custody of his infant daughter,

v.

Anonymous,

Respondent-Respondent.

An appeal having been taken to this Court by the petitioner-appellant from an order of the Supreme Court,

New York County entered on the 12th day of March, 1956, denying petitioner's application for custody and dismissing the petition, and said appeal having been argued by Miss Dora Aberlin of counsel for the appellant, and by Mr. Alfred Weinstein of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same hereby is affirmed with $20 costs and disbursements to the respondent.

Enter,

GEORGE T. CAMPBELL,
Clerk.

ORDER OF JUDGE MARKEWICH.

At a Special Term Part XII of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, Pearl and Centre Streets, in the Borough of Manhattan, City of New York, on the 12th day of March, 1956.

Present: HON. ARTHUR MARKEWICH, Justice.

[SAME TITLE]

The petitioner above named, having brought a proceeding by order to show cause dated the 27th day of October, 1955, for an order awarding him custody of his

infant daughter, Dorothy Gail Aberlin, and said order to show cause having directed service thereof upon the Corporation Counsel and said order to show cause having been duly served upon the Corporation Counsel of the City of New York, and the said Corporation Counsel having moved by notice of cross-motion dated November 9th, 1955, for an order granting him affirmative relief, dismissing the proceedings herein on the ground that the petitioner failed to state any facts entitling him to the relief demanded or to any relief, and said order to show cause of the petitioner having duly come on to be heard on the 31st day of October, 1955, and having been thereafter adjourned by subsequent adjournments to the 29th day of November, 1955, and said order to show cause having then come on to be heard on the 29th day of November, 1955, and the petitioner appearing by Dora Aberlin, his attorney and the Corporation Counsel appearing in opposition to said petition, and both sides submitting on that day, and the Court having rendered an interim decision herein on December 15th, 1955, and the Court having thereafter ordered the filing of additional affidavits and having thereafter rendered its decision on the 5th day of March, 1956.

Now, on reading and filing the order to show cause dated October 27th, 1955, and the petition of Isadore Aberlin attached thereto, duly verified the 27th day of October, 1955, and the exhibits attached to said petition and the supplemental affidavit of Isadore Aberlin, duly sworn to the 25th day of November, 1955 and the exhibits attached to said affidavit, and upon the records of Bellevue Hospital of the stay of Selma Aberlin, mother of the infant, as a patient in said hospital from on or about February 22nd, 1955 to March 5th, 1955, submitted under subpoena with the said affidavit, and upon reading and filing the

interim decision of Mr. Justice Arthur Markewich dated December 15th, 1955, and the affidavit of Isadore Aberlin duly sworn to the 22nd day of February, 1956, and the affidavit of Dora Aberlin, duly sworn to the 22nd day of February, 1956, with the exhibits attached thereto, all in support of the application for custody, and upon reading and filing the notice of cross-motion dated November 9th, 1955 of the Corporation Counsel praying for affirmative relief and for dismissal of the petition herein and the affidavit of Rose Schnepe attached thereto, dul. sworn to the 8th day of November, 1955, and the affidavit of James Zisman sworn to the 25th day of January, 1956 with the exhibits attached thereto, all in opposition to said proceeding, and due deliberation having been had, and the Court having rendered its decision and opinion herein in writing on the 5th day of March, 1956, it is

ORDERED, that the application of Isadore Aberlin for custody of his infant daughter, Dorothy Gail Aberlin, be and the same hereby is denied, and it is further

ORDERED, that the cross-motion of the Corporation Counsel for affirmative relief dismissing the petition herein, be and the same hereby is granted, and it is further

ORDERED, that the stay heretofore granted herein of the proceedings in the Domestic Relations Court of New York County, be and the same hereby is vacated.

Enter,

A. M.,
J. S. C.

Filed
March 12, 1956
New York Co. Clerk's Office

Appendix B

Interim Opinion of Mr. Justice Arthur Markewich

Aberlin v. Aberlin—There seems to be a little dispute as to those facts which are relevant and material to this interim decision. They are set forth chronologically.

Petitioner and his former wife were married in January, 1944, in Maryland; their daughter was born in February of the following year. In May, 1953, a divorce was procured against petitioner in Boston, Massachusetts, and the wife obtained custody of the child, the decree providing for support at $25 a week. The husband was accorded visitation rights by separate agreement of the parties. In the summer of 1954, petitioner was living in this city, which had been his residence for some time prior to his marriage in 1944. At that time, he received two letters from his former wife and one from an attorney representing her, by which, for the reasons set forth in such correspondence, he was requested to take over custody of the child. As requested, petitioner met his daughter on her return from a summer camp and assumed her care. About a week later the mother came to this city, and the child was returned to her by arrangement between the parties and then registered by the mother in one of our public schools. The mother obtained employment, so that petitioner arranged for the child to be cared for at a play center during afternoons after school. The child and both parents continued to reside here, though separate and apart, the infant with her mother. On February 21, 1955, the mother, apparently having become apprehensive as to her mental condition, turned her daughter over to the father and, on the following day, "signed herself into" Bellevue Hospital for observation. Her difficulty was diagnosed as mental illness, and commitment to a state hospital was recommended by the Bellevue staff, but before papers of commitment to a state hospital could be carried into effect, the husband of the wife's sister, a Boston attorney (not the same one who had

represented the wife in correspondence with petitioner in August, 1954), came to Bellevue and procurred the "discharge on contract" of his sister-in-law for treatment at a state hospital in Massachusetts. She was thereafter admitted to such an institution. Several weeks after the transfer, the wife's sister (maternal aunt of the infant) applied to the Probate Court of Suffolk County, Massachusetts, for modification of the original divorce decree which had granted custody of the infant to the mother. The court was told that the mother was ill and that the father had agreed to send the child to the aunt during such illness but had refused to do so. The father (petitioner herein) was never notified of such application. The decree was modified as requested and temporary custody of the child given to the aunt. About a week thereafter the husband of the new "guardian" took the matter into his own hands and, without request to or permission from the child's father, took her from her school and removed her to Boston. The first notification received by petitioner of the taking of his daughter was by telegram that evening from Boston.

The father sought legal redress without avail: He applied to the Federal Bureau of Investigation and to the district attorney but he did not, for reasons which can be presumed, press criminal charges; he applied to this court for *habeas corpus* which was refused, the child being without the jurisdiction; he applied to the Massachusetts courts and was rebuffed, which determination is presently on appeal. The only effective step taken by petitioner was to cease the payments of $25 a week which he had been making from the time of the divorce except during the periods when the child was actually with him. This action on his part set off a new chain of events. When petitioner ignored the demand upon him that he remit support payments to the new custodians of his child, the aunt's next move was to request the Probate Court to restore custody of the child to the mother. Inasmuch as the mother is

apparently still regarded as incompetent, there can be only one reason for this tactic: Under sections 2111-2120, Unconsolidated Laws, the Uniform Support of Dependents Law, it would seem that the order of the Massachusetts court could not be enforced by our court of Domestic Relations while the aunt was the custodian of the child. Notice by registered mail of this application was sent to petitioner but, under the circumstances, he did not appear. The application was granted and custody restored to the mother on September 23, 1955. Thereupon, there were additional court proceedings in Boston and in New York, and the corporation counsel took step under the Uniform Support of Dependents Law to enforce such payments. Petitioner seeks here to secure custody of his child. Decision as to custody would, of course, be determinative of enforcement of the order for payment. The corporation counsel had countered with a request for dismissal of the proceedings. The order to show cause which has brought this matter on has stayed enforcement of the payment order.

Comity between states does not require that a court shut its eyes to the surrounding circumstances. If "custody" in the mother flows from what has been described as virtually a kidnapping, I know of no principle of law which requires this court to enforce an order which is the result of defiance and utter disregard of law. It is the father's claim that he is the true legal custodian of his daughter by virtue of the affirmative acts of the child's mother passing such custody to him. Every other question before me is subordinate to and turns on the question of custody, and that question may not be decided without a hearing. Were I to order such a hearing now, there is only one actor in this strange drama of whose voluntary appearance I could be certain: the petitioner himself. In the hope that others with knowledge

and information may voluntarily appear and participate, I shall not at this stage fix the time and place of the hearing. The corporation counsel is directed to communicate with the mother of the child and the mother's sister and brother-in-law in Boston, and then, as expeditiously as possible, to advise the court with respect to the possibilities of their voluntary appearance at a hearing. Pending such report, all proceedings will be held in abeyance; specifically, the stay contained in the order to show cause is continued. Petitioner's attorney is directed to serve a copy of this memorandum decision upon the corporation counsel forthwith.

OPINION OF JUDGE MARKEWICH

SUPREME COURT—SPECIAL TERM,

PART XII.

By Mr. Justice Arthur Markewich

Matter of Aberlin (Aberlin)—This petition seeks custody of petitioner's infant daughter. There is no named respondent, but, for all practical purposes, the "respondent" (whether petitioner's former wife or the authorities who seek to enforce the support payments) is represented by the corporation counsel, who, pursuant to the Uniform Support of Dependents Law, had commenced proceedings to enforce, through our Domestic Relations Court, an order of an appropriate court in Massachusetts for support of the infant. The order to show cause herein stayed such proceedings, the stay is still in effect. The statements made in petitioner's papers were at first completely uncontradicted, for the corporation counsel seemed disposed to argue only the law. It appeared, *prima facie* at least,

that petitioner's divorced wife had intended to change her domicile or, in any event, that of their child from Massachusetts to New York, that she had intended to pass custody of the infant, granted to her by the Massachusetts courts, to petitioner and did deliver the child to the father; that there after the child was removed to Massachusetts by her maternal uncle; that, in effect, a fraud had been practiced upon the courts of Massachusetts by concealment of these facts, and that a crime had been committed.

Regardless of the form of the petition, sufficient had been shown to sustain the inference that there might well have been a miscarriage of justice for which a remedy, whether in the nature of prohibition or otherwise, might be found. Accordingly, an interim decision was filed on December 15, 1955, wherein a hearing was directed to be held, to which the corporation counsel was to endeavor to bring those witnesses who might shed light upon the matter. The result was that the child's uncle, upon request of the court, supplied an affidavit for the record; full opportunity was given to petitioner to reply thereto. These papers are now before the court. Had their contents been made known earlier, no interim decision would have been necessary.

It is now quite clear that the matter has been fully litigated in the courts of Massachusetts, which has jurisdiction over the subject matter and where the child is. Further, it appears that no fraud was practiced upon that court, that this petitioner had a full opportunity to state his case therein, including that which has been set forth in this proceeding, and that detailed findings and conclusions submitted therein by this petitioner were passed upon. Accordingly, by well settled principles of comity, full faith and credit must be given to the decision in Massachusetts, denying custody to this petitioner (*Williams* v. *State of North Carolina*, 317 U. S., 287; *Vanderbilt* v. *Vanderbilt*, 207 Misc. 291; Aff'd 1 App. Div., 2d, 3).

Appendix B

Recourse to the courts of this state might perhaps have been had during the father's temporary possession of the infant, but no such application was made. It is now too late for this court to act, for jurisdiction no longer lies in New York.

Much has been said in the papers as to the respective capacities for custody of petitioner, his former wife, and the relatives of both. I am not unmoved by these arguments, no one of flesh and blood could fail to feel concern for the little girl who is the only victim of this struggle. But any further comment by me would be an empty gesture for a lack of jurisdiction cannot be supplied on the basis of sympathy.

Disposition is now made of all pending proceedings. Petitioner has moved separately (Motion Calendar F-348, Special Term, Part XII, February 23, 1955), to strike from the record the uncle's affidavit (submission of which had been invited by the court) and to set a date for hearing or to grant custody; that motion is denied in toto for the reasons set forth above. The original petition herein (Motion Calendar F-131, Special Term, Part XII, November 29, 1955) is dismissed and the stay contained in the order to show cause of October 27, 1955, is vacated; the cross-motion for an order to the same effect is granted. The title of the interim decision of December 15, 1955, is to be deemed corrected to the form in which it appears at the head of this decision. The record of Bellevue Hospital submitted as an exhibit upon this proceeding is transmitted to the clerk to be returned to the hospital.

Matter of Aberlin (Aberlin)—Motion is denied for the reasons set forth in the decision of motion No. F-131, Special Term, Part XII, calendar of November 29, 1955, published simultaneously herewith.